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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

NATIONAL MEDIATION BOARD, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Mediation Board lawfully may insist that a union first waive its statutory right to strike before it may make use of the dispute resolution procedures available under Section 5, First of the Railway Labor Act, 45 U.S.C. § 155, First.

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PETITION FOR A WRIT OF CERTIORARI

The International Association of Machinists and Aerospace Workers hereby petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia in International Association of Machinists and Aerospace Workers, D.C. Cir., No. 90-5201 (April 12, 1991, amended April 29, 1991).

OPINIONS BELOW

The Court of Appeals' Memorandum Opinion of April 12, 1991, as amended April 29, 1991 is reproduced in the Appendix ("App.") to this petition at pp. 1a-10a. The opinion of the Court of Appeals is reported at 930 F.2d 45. The judgment of the Court of Appeals is reproduced at App. 10a. The District Court's Order dated June 29, 1990 is reproduced at App. 11a. The District Court did not issue a written opinion and its order is unreported.

JURISDICTION

The decision of the Court of Appeals was rendered on April 12, 1991 and amended on April 29, 1991. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Proceedings Below

This case arose out of a bargaining dispute under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, between the plaintiff International Association of Machinists and Aerospace Workers ("IAM" or "the Union") and the nation's rail carriers. The National Mediation Board ("NMB" or "the Board") had taken jurisdiction of the dispute after its mediation processes had been invoked by the parties. See, 45 U.S.C. § 155, First. When the NMB's efforts to mediate a resolution of the dispute proved unsuccessful, the NMB nevertheless declined to terminate the process and release the IAM to the succeeding steps set forth in the RLA. The IAM filed suit challenging the NMB's requirement that the union relinquish its statutory right to strike as a condition for moving the dispute beyond the mediation stage. The district court had jurisdiction over this claim pursuant to 28 U.S.C. §§ 1331, 1337, and 1361.

The District Court refused IAM's request for injunctive relief and dismissed the complaint by order dated June 29, 1990. App. 11a. This ruling was based on the allegations in the complaint supplemented by affidavits and exhibits filed in support of and in response to the IAM's motion; no evidentiary hearing was held. The Court of Appeals affirmed the District Court's order. App. 1a-10a.

B. Statement of Facts

The IAM has been engaged in multi-employer bargaining over a new collective bargaining agreement with the nation's rail carriers since April 1988. The National

Mediation Board has held the parties in mediation under Section 5 of the RLA since October 13, 1988. The Board has conducted mediation sessions on numerous occasions through assigned mediators and the Chairman of the agency. Until March 1990, these sessions were conducted jointly with all labor organizations and carriers in the industry involved in what is called "national handling". In February 1990, the Chairman of the Board, who personally was acting as chief mediator, openly admitted to the parties that the Board's mediatory efforts had failed.

Thereafter the NMB tried to convince the parties to agree upon a procedure whereby the Board would release them from mediation and proffer arbitration, and the President of the United States would appoint an emergency board to make recommendations regarding settlement of the dispute. By statute, after an emergency board's recommendations are considered, the parties are free to engage in economic self-help, including the right to strike. Under the NMB's proposal, however, the unions were to agree to suspend their right to strike until at least October 15, 1990, and then not exercise the right unless Congress was in session.

The IAM refused to agree to waive its right to strike in this manner and requested that the Board follow the procedure set forth in the Act instead and honor its statutory obligation to proffer arbitration in accordance with Section 5 of the Act, giving the union the right to strike after all statutory procedures were exhausted. The Board advised the IAM that unless it agreed to the aforesaid extra-statutory procedure, no proffer would be forthcoming.[1] Absent a proffer under the Act, the status quo

[1] The IAM presented undisputed evidence that it was told by the Chairman of the NMB that he had discussed the matter with officials in the White House and was told that an emergency board would not be created in this dispute unless the union accepted the conditions being placed on the termination of the mediation stage. He also said that without White House concurrence to appoint an emergency board, he did not think the NMB would release the parties from mediation. See, App. 6a.

remains in place and neither party may engage in economic self-help. The carriers and other unions did agree to the NMB's conditions and the Board proffered arbitration to them in their disputes. IAM did not. Its dispute, therefore, remains stalled in the mediation stage.

IAM filed its complaint challenging the NMB's conduct on April 25, 1990. Following a hearing on IAM's motion for preliminary and permanent injunctive relief and on NMB's motion to dismiss, the District Court issued an order finding that the union "has failed to state a claim of patent official bad faith against [the Board] concerning the continuation of mediation for [IAM]'s labor dispute." App. 11a. The union appealed.

In an opinion dated April 12, 1991, and amended April 29, 1991, the Court of Appeals affirmed the district court's ruling. It sustained the NMB's conduct on the premise that "[c]lose judicial review of the NMB's subtle, yet necessarily freewheeling, methods could cripple the agency". App. 6a. It found itself unable to conceive that "this mixed adjudicatory-mediation scheme" was outside the Board's authority, though "[j]ury-rigged it may be." *Id.* The lower court refused to place "any legal significance" on the admission by the Chairman of the agency that mediation had failed, characterizing it as possible "blarney (hoomalimali in Hawaiian)", the true meaning of which it found to be beyond judicial inquiry. App. 8a. Applying a standard of "patent official bad faith", the Court of Appeals upheld the NMB's highly unusual conduct. App. 6a-9a.

REASONS FOR GRANTING THE WRIT

This Court has not had occasion to set a standard against which the Mediation Board's conduct of the mediation process is to be weighed. It has however considered the "major dispute" process, of which mediation is a part, on numerous occasions. See, *Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. 369 (1969);

Chicago & N. W. R. Co. v. Transportation Union, 402 U.S. 570 (1971); *Burlington Northern R. Co. v. Maintenance of Way Employes*, 481 U.S. 429 (1987); *TWA, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 441 (1989). Each of these decisions confirms the intent of the RLA that once the mediation process has run its course, the parties' respective rights to resort to self-help are guaranteed by the Act. Most recently, the Court expressed its understanding that "judicial intervention in RLA procedures [is] to be limited to those cases where 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress has written into the Railway Labor Act.'" *TWA, Inc., supra* at 441, quoting *Switchmen v. National Mediation Board*, 320 U.S. 297, 300 (1943). In *TWA* the Court reiterated its approval of the concept that "the duty to exhaust the dispute resolution procedures 'does not contemplate that governmental power should, after failure of the parties to reach accord, be added to the scales in favor of either party and thus compel the other to agree upon the aided party's terms. Rather, at that point, impasse was to free both parties to resort to self-help.'" *TWA, supra* (citation omitted). "The availability of self-help measures rather than judicial remedies 'may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle prior to exhaustion of the statutory procedures.'" *Id.*, quoting *Burlington Northern, supra* at 451-452.

The RLA major dispute resolution process has five parts: the serving of proposals to change existing agreements, 45 U.S.C. § 156; conferences and direct negotiations between the parties, *Id.*; mediation by the NMB, 45 U.S.C. § 155; proffer of arbitration, *Id.*; arbitration if mutually agreed or termination of mediation, and, finally, resort to economic self-help, *Id.* In the absence of arbitration, the President may create an Emergency Board to assist in the resolution of the dispute. 45

U.S.C. § 160. "While the dispute is working its way through these stages, neither party may unilaterally alter the status quo. §§ 2 Seventh, 5 First, 6, 10 [45 U.S.C. § 152, Seventh, § 155, First, § 156, § 160]." *Railroad Trainmen v. Jacksonville Terminal Co., supra*, 394 U.S. at 378 (1969). Accord: *Detroit and Toledo Shore Line R. Co. v. UTU*, 396 U.S. 142, 150 (1969).

This process is universally recognized as long and drawn out, but it is not endless. See, *Detroit and Toledo Shore Line R. Co. v. UTU, supra* ("[T]he exhaustion of the Act's remedies [is] an *almost* interminable process.") (Emphasis added). "It does some time come to an end." *Delaware and Hudson Railway Co. v. UTU*, 450 F.2d 603, 608 (D.C. Cir. 1971).

Once mediation is invoked, the NMB becomes the policeman of the process. The RLA vests the NMB with the authority to hold carriers and unions in mediation until its efforts to bring about a mediated settlement prove unsuccessful. The Act places no time limits on mediation and leaves the determination when impasse has been reached to the Board. Once that determination is made, however, the statute mandates that the Board proffer arbitration; if arbitration is rejected, the Board must notify the parties that its mediatory efforts have failed. The Board's *sole remaining function* at that point is to advise the President whether, in the Board's judgment, the dispute "threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service." 45 U.S.C. § 160. The President "may thereupon, in his discretion, create a board to investigate and report respecting such dispute." *Id.* The appointment of an emergency board defers, but does not eliminate the right to strike. Should such a board be appointed, its' recommendations are non-binding; if they do not form the basis for a settlement the parties are free to resort to self-help thirty days after the recommendations are issued. *Id.*

Thus, the Act contemplates that the Board's determination whether its mediatory efforts have failed be based on the success its participation in the process has generated in leading the parties to an agreement. Crucially, the Act does not require the parties to reach agreement in mediation; it only requires that they subject themselves to the Board's jurisdiction in the hope that a settlement can be facilitated. If the Board's efforts prove unsuccessful, the Board's only alternative is to proffer arbitration. Congress specifically left the decision as to whether further governmental intervention is warranted after that to the President and the President alone. And even if an emergency board is appointed, after it recommends a settlement, either party may reject the recommendation. The process ends with the right to strike, a right protected by the statute itself.

What happened here is that the Board turned the statutory process on its ear. The Chairman of the Board, who conducted the mediation, told the parties that mediation had failed to bring about an agreement. At that point, the Board should have proffered arbitration and let the statutory process run its course. If arbitration was rejected, then the Board could have notified the President of the threat the dispute posed to interstate commerce, as the statute contemplates.

Instead, the Chairman went directly to the White House to inquire under what conditions the President would create an emergency board. Then, without regard to the admitted failure of the Board's mediatory efforts, the Board decided that it would not terminate mediation unless the President would appoint an emergency board. The Board demanded that the parties meet the President's requirements for appointment of an emergency board as the price for a release from mediation. Those who paid the price reaped the reward of a proffer of arbitration. The IAM did not, and the Board continues to hold it hostage.

In this case, the NMB asserted its power *not* to bring about a contract settlement but instead to prevent the IAM from freely exercising statutorily-protected self-help measures because the union refused to waive rights Congress granted it in the RLA. The undisputed facts before the District Court revealed that the Mediation Board refused to terminate mediation *not* because some glimmer of hope existed that continued mediation might generate a settlement, but instead because the union would not waive its right to strike.

The NMB Chairman unashamedly admitted that the union's refusal to waive its statutory rights, rather than accept the process demanded by the Board, formed the basis for the Board's action. The Court of Appeals found this to be an acceptable tactic for a mediator to use to pressure a settlement because the RLA "nowhere defines mediation" (App. 7a). This definitional omission, however, cannot properly be viewed as a conscious grant to the agency of unrestricted license to ransom the Act in its efforts to generate a settlement. Unfortunately, this is just what the Circuit Court's decision accomplishes. In sum, this is not a case in which a party to a labor dispute is challenging the Board's exercise of discretion; rather, here the Board has decided to *refuse* to act unless and until the union agrees to waive its statutory right to strike.

The lower court's ruling gives the NMB unbridled power over parties in a labor dispute, even to the point of authorizing the NMB to ignore the very statute which it was created to administer. If what the NMB did to the IAM is acceptable, it is impossible to conjure up what the Board would have to do in order to breach the "patent official bad faith" standard applied by the Circuit Court.

The Court of Appeals' decision has broad implications for collective bargaining in the nation's rail and airline industries, both of which the NMB regulates. See 45 U.S.C. § 203. The statutory bargaining process becomes a sham when the threat of self-help is eliminated. Never-

theless, that is precisely what the lower court has sanctioned here. When impasse is reached, the RLA requires a proffer of arbitration which, if not accepted, leads to a termination of mediation and the beginning of a thirty-day cooling off period. After that, Congress left the parties unrestrained in the hope that, if the threat of self-help did not lead to a settlement, the real thing would in short order. If the Mediation Board is allowed to condition its proffer of arbitration, despite the admitted existence of impasse, on the surrender of the right to strike, the statutory scheme is eviscerated.

The opinion below places restraints on a union's right to strike far beyond that contemplated by the law. Congress' injection of governmental regulation into the bargaining process was in no wise intended to eliminate the possibility that at some point economic force might be the only way to resolve the dispute. The scheme of the Act contemplates an interruption of commerce if the parties exhaust each step of the process without reaching agreement. At that point, "self-help . . . is not an evil; in fact, the threat of damaging economic warfare is essential to encourage good faith mediation." *International Association of Machinists v. National Mediation Board*, 725 F. Supp. 558, 562 (D.D.C. 1989). The Circuit Court's willingness to validate the Board's withholding of a proffer simply to prevent the union from exercising its legal right to strike undermines the entire statutory process.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 19, 1991 Decided April 12, 1991

No. 90-5201

INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, AFL-CIO,
Appellant

v.

NATIONAL MEDIATION BOARD, *et al.*

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 90-00964)

Michael S. Wolly for Appellant.

Marc Richman, Attorney, Department of Justice, with whom *Stuart M. Gerson*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney, *William Kanter*, Attorney, Department of Justice, and *Ronald M. Etters*, General Counsel, National Mediation Board, were on the brief, for Federal appellees. *R. Craig Lawrence* and *Susan A. Nellor*, Assistant United States Attorneys, entered appearances for Federal appellees.

Peter Buscemi, with whom *William J. Curtin*, *Harry A. Rissetto* and *Thomas J. O'Brien* were on the brief, for appellee National Railway Labor Conference.

Before: SILBERMAN, WILLIAMS, and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: Since October 1988, appellant International Association of Machinists & Aerospace Workers ("the IAM") has participated in mediation conducted pursuant to the Railway Labor Act under the auspices of appellee National Mediation Board ("NMB" or "Board"). The Board has sought to settle a nationwide collective bargaining dispute between virtually all of the nation's rail carriers and 12 unions, including the IAM. The IAM has demanded to be released by the Board from further mediation so that it may exercise "self-help" (*i.e.*, strike). The Board has refused to release the IAM, and the IAM therefore filed suit in district court to enjoin the Board from holding it in mediation. The district court granted the Board's motion to dismiss. We affirm.

I.

A.

We have recently described in some detail the elaborate framework established by the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, for resolution of labor disputes between unions and rail carriers, *see Local 808, Building Maintenance, Serv. and R.R. Workers v. NMB*, 888 F.2d 1428, 1431-33 (D.C. Cir. 1989); *see also Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378-80 (1969), and will summarize it only briefly. "The major purpose of Congress in passing the Railway Labor Act was to provide the machinery to prevent strikes and the resulting interruptions of interstate commerce." *International Ass'n of Machinists & Aerospace Workers v. NMB*, 425 F.2d 527, 533 (D.C. Cir. 1970) (*"IAM"*). Toward that end, "[t]he Act provides a detailed framework to facilitate the *voluntary* settlement of major disputes," *Trainmen*, 394 U.S. at 378 (emphasis added), relying heavily upon "the traditional instruments of mediation, conciliation, and arbitration," *General Comm. of Adjustment v. Missouri-Kan.-Tex. R.R.*, 320 U.S. 323, 332 (1943), and during whose pendency the

union may not strike and no party may alter the status quo, 45 U.S.C. §§ 152, Seventh, 155, First, 156.

A party seeking changes in pay, rules, or other working conditions must first give the other party 30 days written notice of its proposals, during which time the parties must confer on the matters raised. 45 U.S.C. § 156. Should the parties be unable to resolve the dispute through conference, either or both may invoke the services of the National Mediation Board. 45 U.S.C. § 155, First. The Board is obligated promptly to "put itself in communication with the parties" and to "use its best efforts, by mediation, to bring them to agreement." *Id.* The Act specifies no time limit on mediation. If, however, "such efforts to bring about an amicable settlement through mediation shall be unsuccessful," *id.*, the Board "shall at once endeavor as its final required action . . . to induce the parties to submit their controversy to [binding] arbitration," which can take place, however, only if both consent. 45 U.S.C. § 155, First. If arbitration is refused by one or both parties, the Board "shall at once notify both parties in writing that its mediatory efforts have failed . . . ." *Id.* The Board may then notify the President that the dispute "threaten[s] substantially to interrupt interstate commerce," and the President may create an emergency board to investigate further and report its recommendations to the President within 30 days, 45 U.S.C. § 160.

Should the Mediation Board not so notify the President, or should the President decline to create an emergency board, the parties are free to resort to self-help. But the parties may do so only after a 30-day "cooling-off" period following the refusal to agree to arbitration. 45 U.S.C. § 155, First. And if an emergency board is created, the parties may not resort to self-help for 30 days following submission of the emergency board's report. 45 U.S.C. § 160.

It is therefore evident that the "crucial aspect of the Act['s ability to forestall strikes is] the power given to

the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process." *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149 (1969). And the real "key" is the Board's authority to hold the parties to a dispute in mediation so they cannot engage in self-help; it is "a coercive tool essential to bringing the parties to conciliation." *Local 808*, 888 F.2d at 1432, 1438.

B.

The appellant and 11 other unions set the Act's process in motion by filing notices with virtually all of the nation's rail carriers, requesting changes in wages, rules, and other working conditions. In October 1988, after 10 months of negotiations had failed to resolve the dispute, both sides requested mediation by the Board. When, after one year of mediation, the deadlock remained, all parties insisted that mediation could not break the impasse and requested that the NMB release them and proffer arbitration. The Board instead began intensified mediation, with NMB Chairman Joshua Javits directly participating, but no headway was made in four months. The IAM alleges that Chairman Javits at this point told its vice-president that "mediation had failed."

The IAM then renewed its request that the NMB release it from mediation and either proffer arbitration or notify the President so he could consider the need for an emergency board. The other 11 unions and all the railroads thereupon reached a "procedural settlement" in which the NMB concurred. Under the settlement's terms, the Board would release the parties from mediation and proffer arbitration and the President would appoint an emergency board on the conditions that: (1) the emergency board would not be bound to report within the 30-day statutory period but would instead have at least 6 months; (2) the parties would refrain from self-help until 30 days after the report issued and only at such time as

Congress was in session; and (3) the Board would conduct further mediation on certain aspects of the dispute. The Board offered the IAM the opportunity to participate and informed it that it would be held in mediation unless it accepted.

The IAM alone refused to join the settlement and sought an injunction from the district court restraining the Board from holding it in mediation. The union contended that the Board has no authority to impose conditions governing when it will release parties from mediation and that it was in any event required under the Act to release the IAM because of Javits' "admission" that mediation had been unsuccessful. The district judge, ruling orally from the bench, granted the Board's motion to dismiss.[1]

II.

The IAM is swimming up river. The scope of review of Board decisions—including determining whether the NMB acted outside of its authority in refusing to release a party from mediation—"is one of the narrowest known to the law," *International Ass'n of Machinists & Aerospace Workers v. Trans World Airlines*, 839 F.2d 809, 811 (D.C. Cir.), *amended*, 848 F.2d 232 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988); as we recently observed, the only court to have ordered the Board to terminate

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[1] The court stated cryptically that "if the Court of Appeals wants to know the basis for my ruling, they can read the transcript. See if they can figure it out." The district court considered affidavits in making this ruling; we therefore review its decision as if it granted summary judgment in favor of the Board. *See* FED. R. CIV. P. 12(b); *Sacks v. Reynolds Securities, Inc.*, 593 F.2d 1234, 1239 (D.C. Cir. 1978). But the propriety of summary judgment turns here on a question of law. The IAM argues that the district court's ruling was erroneous not because there are disputed issues of fact but because the district court incorrectly in its view determined that the facts it alleged did not, as a matter of law, justify setting aside the Board's decision to hold it in mediation. We therefore think it unnecessary to read the transcript.

mediation was quickly reversed on appeal. *See Local 808*, 888 F.2d at 1433. Close judicial review of the NMB's subtle, yet necessarily freewheeling, methods could cripple the agency because "[t]he effectiveness of [its] private dispute resolution procedures depends . . . on the . . . assurance that neither party will be able to enlist the courts to further its own partisan ends." *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 411 (1989); *see also Local 808*, 888 F.2d at 1433-34. That is why we have said that we will interfere with the Board's efforts only upon a showing of "patent official bad faith," and will order the parties released from mediation only when "the Board continues mediation on a basis that is completely and patently arbitrary and for a period that is completely and patently unreasonable.'" *Local 808*, 888 F.2d at 1434, (quoting *IAM*, 425 F.2d at 537).

Appellant asserts that in this case the Board has crossed this high threshold and has acted in patent bad faith. It rests this claim first on the Board's imposition of a barrier to the union's ability to strike not specifically mentioned in the statute—proposing to release it from mediation only if it agreed, along with the other unions, to the procedural settlement—and second on the Board's refusal to release it from mediation even though the Board's Chairman admitted that mediation had "failed."

Appellant makes a great deal of the unorthodox nature of the procedural agreement, even suggesting that it was somehow improper for the NMB to have consulted with the White House concerning the circumstances under which the President would set up an emergency board. We might be able to conceive of procedures or conditions that the Board could seek to impose on parties that would be outside the Board's authority, but this mixed adjudicatory-mediation scheme is not one of them. Jury-rigged it may be, but we are not entitled to prevent the Board from experimenting with any mediation device that can

fairly be said to be designed to settle a dispute without a strike and does not independently offend other laws. Indeed, the statute nowhere defines mediation. *See generally Switchmen's Union of North America v. NMB*, 320 U.S. 297, 305 (1943) (definition of terms as used in the Railway Labor Act falls within the NMB's discretion); *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 462 U.S. 837, 842-43 (1989).

It thus seems quite apparent that the crux of appellant's case turns on its second proposition—that the NMB was obliged to release the IAM when Chairman Javits said that mediation failed.[2] The government points out that Chairman Javits' remarks is not necessarily attributed to the full Board. Even if it were, however, we do not think that it is a hook strong enough to hold appellant's case. To be sure, the statute states that if mediation efforts "shall be unsuccessful," the Board "shall" proffer arbitration. 45 U.S.C. § 155, First. But we do not believe that any great legal significance can be placed on the Chairman's observation that mediation "had failed." It could be said at any stage in a mediation process prior to a successful conclusion of a collective bargaining agreement that mediation up to that point had failed. Congress surely expected the Board to make a judgment as to whether mediation would be unsuccessful in the future before it gave up.[3] We cannot conclude,

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[2] Counsel for appellant conceded at oral argument that the legal effect of the statement would be decisive.

[3] Moreover, we cannot see how we could find patent official bad faith solely on the basis of a statement by the Board that mediation could not in the future work. Whether mediation will eventually work is truly unknowable—one of the chief attributes of mediation is that the passage of time alone will produce an atmosphere more conducive to settlement. *See, e.g., Local 808*, 888 F.2d at 1436-38. It is thus no surprise that our review in this area has focused not on whether mediation could work but on the amount of time the Board has held a union in mediation and that we have suggested that we will order the Board to end mediation only after

based on Chairman Javits' statement, that this was a case in which there was manifest "a lack of any genuine hope or expectation that the parties will arrive at an agreement." *Local 808*, 888 F.2d at 1434 (quoting *IAM*, 425 F.2d at 537). In this case, as the government points out, the IAM's implacability might well soften, if after this hybrid procedure runs its course, a settlement between the railroads and the other 11 unions comes about. It is well recognized that the Board is entitled to use time alone to wear down an obdurate bargainer. *See Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966); *see also Local 808*, 888 F.2d at 1432, 1436-38; *International Bhd. of Elec. Workers v. Washington Terminal Co.*, 473 F.2d 1156, 1171 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 906 (1973).

Accordingly, although it is possible to construe the Chairman's remark as meaning that he is giving up on mediation, we do not think it appropriate for a court to examine a Board member's statements, made in the course of mediation, so critically. Successful mediators often liberally use blarney (hoomalimali in Hawaiian) as one of their mediation tools. *See Local 808*, 888 F.2d at 1436-37. The Chairman's statement may well have been a ploy. By inquiring as to the true meaning of such a statement we could well undermine its entire purpose by forcing the Board to admit it was a tactic to spur negotiations. Thus, intrusive judicial scrutiny would likely prolong the dispute—litigation hardens the parties' positions and " 'the artificial pressure and distortion' " of an appeal to the courts further detracts from the mediatory effort. *Id.* at 1439 (quoting *IAM*, 425 F.2d at 540). For that reason, we think it inappropriate ordinarily to review statements by individual members of the Board made in the course of dealing with the parties to determine

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a theoretical time limit ("a period that is completely and patently unreasonable") has passed with no resolution. *See, e.g., Local 808*, 888 F.2d at 1434; *IAM*, 425 F.2d at 543.

whether the Board concluded or should have concluded that mediation will not be effective. Congress, presumably with these considerations in mind, required the Board to notify the parties "*in writing* that its mediatory efforts have failed" after its proffer of arbitration is refused, 45 U.S.C. § 155, First (emphasis added); it is at that point that Congress expected legal significance to attach to Board communications with the parties concerning failure of mediation (the parties may engage in self-help 30 days after receiving the written notification).

* * * *

For the foregoing reasons, the district court's dismissal is affirmed.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5201

INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, AFL-CIO,
Appellant

v.

NATIONAL MEDIATION BOARD, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: SILBERMAN, WILLIAMS, and RANDOLPH, Circuit Judges

JUDGMENT

[Filed Apr. 12, 1991]

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion for the Court filed herein this date.

Per Curiam

FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

Dated: April 12, 1991
Opinion for the Court filed by Circuit Judge Silberman

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

C.A. No. 90-0964 SS

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
Plaintiff,

v.

NATIONAL MEDIATION BOARD
1425 K Street, NW
Washington, D.C. 20572,
Defendant.

ORDER

[Filed Jun. 29, 1990]

This matter having come before the Court on defendant's motion to dismiss for failure to state a claim upon which relief can be granted and plaintiff's motion for preliminary and permanent injunctive relief, and the Court having found that plaintiff has failed to state a claim of patent official bad faith against defendant concerning the continuation of mediation for plaintiff's labor dispute, it is, this 29 day of June, 1990, hereby

ORDERED that plaintiff's motion for preliminary and permanent injunctive relief is denied, and further

ORDERED that defendant's motion to dismiss is granted.

/s/ Stanley Sporkin
United States District Judge